

exercise his discretion at all, through his mistaken belief that in law it was not open to him to do so. His objection was rightly rejected in all Courts. On the other hand the Order that has been made in the respondent's favour is based on the view that the proviso creates a legal right in the respondent to have the rate reduced, which view, as their Lordships hold, is itself ill-founded. The true position is that, while the respondent is an aggrieved person within the meaning of section 75(1) of the Ordinance, its grievance consists, not in the fact that its rate has not been reduced, but in the fact that owing to a misconception of the law on the part of the appellant he has failed to consider whether and to what effect he ought to exercise his power to reduce it.

Their Lordships are of opinion that the right thing to do is to direct the appellant to take the respondent's application into consideration and to deal with it upon the basis of the law as now explained. This is not a case in which the Court ought to substitute a decision of its own for the discretion vested by statute in the assessing authority and so send the assessment back to the appellant with a direction as to the amendment that he ought to make. In some cases that is the appropriate action for a Court to take (see *Minister of National Revenue v. Wright's Canadian Ropes Ltd.*⁽¹⁾). But here the appeal Courts, from the Board of Review upwards, have had to deal with a failure to consider the exercise of a power, intended by the Ordinance to be entrusted to the assessing authority, when the failure has arisen from no other reason than that the authority believed that in law the condition had not arisen which authorised the power to be put into operation. In these circumstances the best way of carrying out the purpose of the Ordinance is to follow the course taken in *Pioneer Laundry & Dry Cleaners Ltd. v. Minister of National Revenue*⁽²⁾ by treating the appellant's refusal to entertain the respondent's application as being unfounded in law and therefore invalid and directing him now to take the matter properly into consideration.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed: that the Orders of the Board of Review dated 26th August, 1952, of the High Court dated 11th February, 1953, and of the Court of Appeal dated 8th June, 1953, should be reversed, except so far as the first mentioned Order holds that the respondent's dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951: and that in lieu thereof it should be declared (1) that the appellant's refusal to entertain the respondent's application dated 27th February, 1952,

for the exercise of his power under section 39 of the Income Tax Ordinance was invalid, and (2) that the appellant ought now to proceed to take the said application into consideration on the footing that the dividends referred to were paid out of such chargeable income. Having regard to the fact that throughout the proceedings each party has in effect contended for a position which in law is not maintainable, their Lordships think that each should pay his or its own costs of the hearings and of this appeal.

Appeal allowed.

Solicitors: *Charles Russell & Co.; Stephenson, Harwood & Tatham.*

NOOR MOHAMED v. PALANIVELU & ANOR.

[O. C. J. (Buhagiar J.) December 17, 1955]

[K. L. — Civil Suit No. 93 of 1955]

Negligence—Personal Injuries—Inconsiderate driving by learner driver—Vicarious liability of proprietor of driving school—Damages—No financial loss—Assessment of damages.

The plaintiff, suing through his next friend, brought this action for damages against the defendants for personal injuries sustained by him while he was riding on a bicycle along Batu Road after his day's work at the Customs Office at Kuala Lumpur. He collided with a lorry and fell off his bicycle. The vehicle was driven by the first defendant, a learner driver, at whose side sat R. an instructor, at a school for learner drivers owned by the 2nd defendant. The first defendant was a registered pupil at the school. The plaintiff as a result of that accident sustained injuries though no serious disfigurement but during his period of incapacitation he did not suffer any financial loss.

The plaintiff alleged that the first defendant overtook him from the rear swerved to the left across his path and without giving a signal stopped suddenly. The plaintiff swerved to the right to avoid knocking into the back of the lorry and in so doing he hit the rear right side of the lorry, lost his balance and another motor vehicle which was following knocked him. The plaintiff was corroborated by P.W. 3, the driver of the following motor vehicle. The first defendant and R., the instructor, however, denied negligence.

The first defendant however had pleaded guilty to a charge of inconsiderate driving before a Magistrate—for which he was convicted.

Held: (1) the injuries sustained by the plaintiff were the direct result of the first defendant's negligence; (2) the plea of guilty to the inconsiderate driving was admissible as against the first defendant; (3) the second defendant was vicariously liable for the negligence of the first defendant as he had an interest or concern in the purpose for which the vehicle was lent which was to enable the first defendant to learn to drive for which he had paid a fee; (4) the damage was assessed at \$500 on the basis that the plaintiff's injuries were not serious although for a time he experienced pain as a result thereof and that he did not suffer any financial loss.

Cases referred to:—

- (1) *Hollington v. Hewthorn* (1943) 1 K.B. 587.
- (2) *Hewitt v. Bonvin* (1940) 1 K.B. 188.

- (3) *Ormrod & anor v. Crosville Motor Services Ltd. & anor.* (1953) 2 All E.R. 753.
- (4) *Barbard v. Sully* 47 T.L.R. 557.

CIVIL SUIT for Damages.

D. G. Ironside for the plaintiff.

D. G. Rawson for the defendants.

Cur. Adv. Vult.

Buhagiar J. : — The plaintiff is claiming damages in respect of personal injuries sustained on 23rd February, 1954 while he was riding a bicycle along Batu Road; he alleges that through the negligence of the driver of a motor lorry driven by the first defendant and belonging to the second defendant he came in collision with that lorry and was knocked down off his bicycle.

The undisputed facts are as follows :—

The plaintiff is employed at the Marine Customs Department in Johore Bahru and is sixteen years old; on 23rd February 1954 he was employed as a peon in the Customs Department at Kuala Lumpur. After his day's work he was cycling along Batu Road in the direction of Ipoh Road; at one point he collided with lorry No. BA-8733 and fell off his bicycle. Lorry No. BA-8733 belongs to the second defendant who is the proprietor of a Public School for Learner Drivers. At the time of the incident the first defendant was having driving lessons on the said lorry under one Ramasami, an instructor in the school belonging to the second defendant. The first defendant was an enrolled pupil in the second defendant's school; he had paid his fees to the school and at the time of the accident he had had about three months training.

On the 23rd February, 1954, the plaintiff was admitted to hospital with a fracture of the right humerus, a scar on the right cheek and a small wound on the posterior aspect of the right elbow; he suffered some pain for about a month after the accident; he was discharged from hospital on the 6th March, 1954 and afterwards he was treated as an out-patient. The scar on the cheek although permanent cannot be said to be any serious disfigurement; the wound on the elbow though more noticeable is not, by reason of its position, a serious disfigurement. The plaintiff was medically examined in December, 1954, and the doctor's finding then was that there would possibly be a very slight limitation of the movement of the right arm; the plaintiff could not then put his arm out quite straight. The plaintiff complains that he could not and still cannot lift heavy weights as he used to; the doctor, however, is of opinion that this complaint may be due to the fact that plaintiff has not for some time used his arm as freely as he used to; he is also of

opinion that the slight stiffness which he noticed in December 1954 will not be a handicap in any way. As a result of these injuries the plaintiff did not suffer any financial loss as he was allowed sick leave while he was in hospital and after being discharged from hospital he was given lighter duties.

Now according to the plaintiff the cause of the accident was the negligence of the driver of the motor lorry that is the first defendant. He stated in his evidence that the motor lorry came from behind, overtook him, swerved to the left across his path and, without giving a signal, stopped suddenly; the plaintiff swerved to the right to avoid knocking into the back of the lorry and in doing so he hit the near right side of the lorry, lost his balance and another motor vehicle which was following knocked him. He has no clear idea as to what happened after that, except that he was taken to hospital.

The plaintiff is corroborated by the deposition of P.W. 3 who was driving along Batu Road, following the lorry and the plaintiff. This witness was cross-examined on a report he had made to the Police according to which the witness had mentioned *inter alia* (1) that the cyclist had hit the front mudguard of his car and (2) that the lorry was stationary. In reply to questions on these points the witness stated that he had stated to the Police that the plaintiff hit the rear mudguard of his car and that the reference to the front mudguard must be a mistake; in fact he said that his car was examined by the Police and it was found that it was the rear and not the front mudguard which was damaged. With regard to the second point he said that the lorry was stationary in that it had stopped suddenly but it had not been stationary for some time before the accident. I do not consider that this witness' credibility was shaken on this cross-examination.

On the other hand the first defendant and Ramasami, the instructor, P.W. 7, both deny that the lorry cut in, to the left, into the plaintiff's path and that the lorry stopped suddenly; they both say that the lorry had been stationary for two minutes before the accident happened; they also say that the lorry did not overtake the cyclist. They also say that the lorry had stopped alongside the edge of the road and not, as the plaintiff and P.W. 3 stated in their evidence, at an angle to the edge of the road.

Apart from the inconsistent stories of the plaintiff and of the defendant, the only other evidence consists of an admission which the first defendant made before the Magistrate on a charge for inconsiderate driving when he pleaded guilty. The first defendant admitted being charged as in Ex. P. 1, and that the charge was read and explained to him; he said that he was asked

whether he had parked the lorry in a certain way; at first he pleaded not guilty but on the second appearance before the Magistrate he pleaded guilty. There is no question that the facts on which the first defendant was charged referred to the facts which form the subject matter of this suit and that being so the plea of guilty in that trial is admissible as an admission against the first defendant — see *Hollington v. Hewthorn & Co.*⁽¹⁾, where at p. 600, Goddard L.J. said:—

“In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff’s case, this could have been proved, but not the result of the trial.”

On behalf of the defendants, it was submitted that in criminal charges of this nature it very often happens that an accused pleads guilty to avoid the further complications and expense of a trial and that in the present case Ramasami, the instructor, D.W. 7 had actually advised the first defendant not to plead guilty. I do not see much force in that argument and while the plea of guilty is not necessarily conclusive evidence of the first defendant’s negligence in the present suit it is an admissible admission which supports the plaintiff’s case and which weighs against the defendant.

In coming to the conclusion I have reached I have not relied solely in such admission; I consider that on the whole of the evidence the probability is that the accident occurred as stated by the plaintiff. While I cannot say from the demeanour of the defence witnesses that they were deliberately telling an untruth I do not consider that their version of the events is correct. P.W. 3 is, in my opinion, a reliable witness and following as he was the cyclist and the motor lorry he was in a better position than anybody else to see all movements of the two vehicles. The first defendant and Ramasami, the instructor, D.W. 7, on the other hand may have been too absorbed, one in mastering the technique of driving and the other in giving instructions to his pupil, to notice the cyclist; they may also have been honestly mistaken in saying that the lorry had been stationary for two minutes before they noticed the cyclist by the side of the lorry.

I therefore find that the injuries sustained by the plaintiff were the direct result of the first defendant’s negligence.

With regard to the liability of the second defendant, the owner of the vehicle, Mr. Rawson submitted that the first defendant was not his servant or agent; that the fact that the first defendant was driving the motor vehicle with the permission or consent of the owner thereof does not make him liable for any negligence. I do not think this is entirely correct. No authorities were quoted to me either in

favour or against this proposition but I think, the cases of *Hewitt v. Bonvin*⁽²⁾ and *Ormrod v. Crosville Motor Services Ltd.*⁽³⁾ are relevant.

Hewitt v. Bonvin⁽²⁾ was a case where a son obtained from his mother, who had authority to grant it, permission to drive his father’s motor car; the son wanted the car for his own purposes in order to drive two girl friends home to Wisbech; neither the father nor the mother knew the girls and it was no concern of either of them that the girls should be driven to Wisbech; on the way back, through the negligent driving of the son, the car was upset and a friend who had accompanied the party to Wisbech was killed. In an action by the administrator of the deceased man against the father, the owner of the car, it was held by the Court of Appeal, that the son was not driving the car as his father’s servant or agent or for his father’s purposes and that therefore the father was not liable for his son’s tortious act. In the Court below Lewis J. said: “It seems to me clear that the boy was driving the car with the consent of the owner. Therefore he was on that journey the servant or agent—the agent—of Mr. Bonvin.” In the Court of Appeal this was held to be an erroneous statement of the law. Du Parc L.J. at p. 194 said:—

“It has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not the servant or agent he is not responsible merely by reason of his ownership for any damage which it may do in that other person’s hands It is true that if the plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the Court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his: (*Barbard v. Sully*, 47 T.L.R. 557); but in the present case all the facts were ascertained and the judge was not left to draw an inference from incomplete data.”

In that case Their Lordships found that the plaintiff failed to show more than a bailment of the car by the father to his son who was the person responsible for driving the car negligently; the fact that the son had the consent of the owner of the car was not sufficient to make the owner responsible. As MacKinnon L.J. said: “He (the son) was driving his own friend, for his own purpose and the father had absolutely no interest or concern in what he was doing.” It is quite clear from Their Lordships’ judgment however that if the father had an interest or concern in what the son was doing the father would have been held liable. Thus Du Parc L.J. at p. 196 says: “In the present case, if the girls concerned had been the guests of the appellant (the father), or if it had been established that Madam Bonvin had allowed her son to take the car because she felt that she and her husband were under some social or moral duty to convey them to their home,

I should have thought that the finding of the learned judge ought not to be disturbed."

In *Ormrod v. Crosville*⁽³⁾ the facts were as follows : While the owner of a motor car was attending the Monte Carlo motor car rally, a friend of his, under an arrangement made between them, was to drive the owner's car from Birkenhead to Monte Carlo; he was to carry a suit case belonging to the owner of the car, was to make the journey in his own time, was to visit friends in Bayeux and was to arrive in Monte Carlo before the end of the rally; thereafter he and the owner of the car were to go on holiday with the car to Switzerland; while on the direct route from Birkenhead to the coast to cross to France, owing partly to the negligence of the friend, the car collided with a motor omnibus which was damaged. It was held that at the time of the accident the car was being used wholly or partly for the car owner's purposes, and, therefore, the friend, while driving it, was the agent of the owner, and, in so far as the friend was guilty of negligence, the owner was vicariously liable therefor.

Devlin J. the trial Judge, in holding that the friend was the agent of the owner of the motor car said :—

"It is clear that there must be something more than the granting of mere permission in order to create liability in the owner of a motor car for the negligence of the driver to whom it has been lent, but I do not think that it is necessary to show a legal contract of agency. It is an area between the two that this case is to be found, and it may be described as a case where, in the words of *du Parcq, L.J.*, there is a 'social or moral' obligation to drive the owner's car".

Devlin J.'s judgment was affirmed on appeal; Denning L.J. said at p. 754 :—

"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes.

And later at p. 755 :—

"If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

In the present case I do not consider that it can be said that the motor vehicle was used by the first defendant for purposes in which the owner, the second defendant had no interest or concern. At the time the vehicle was being used for the purpose of enabling the first defendant to learn driving for which purpose the first defendant had paid a fee to the second

defendant and the latter had provided an instructor on such vehicle. The second defendant cannot therefore escape liability and is vicariously liable for the negligence of the first defendant.

As to the amount of damages; the disfigurements on face and elbow are not at all serious and although the plaintiff suffered pain for a time he is not likely to be permanently disabled. I therefore assess the damages at \$500.

Judgment for plaintiff for \$500 and costs against both defendants.

Judgment for the plaintiff.

Solicitors : *Lovelace & Hastings; Shearn, Delamore & Co.*

ONG BAK HIN v. GENERAL MEDICAL COUNCIL

[P. C. (Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva) April 24, 1956]

[Privy Council—Appeal No. 50 of 1955]

Medical Practitioner—Infamous conduct—Hearing before Medical Disciplinary Committee—Evidence—Conviction in criminal Court in Malaya—Admissibility in evidence of record of criminal proceedings—Statutory powers of Medical Disciplinary Committee.

The appellant, Dr. Ong Bak Hin, a registered medical practitioner practising in Malaya, performed an operation of abortion on a Chinese woman which caused her death. He was convicted in the High Court at Malacca and sentenced to imprisonment. At a subsequent inquiry before the Disciplinary Committee of the General Medical Council in England, the committee decided that the attendance of witnesses from Malaya was not practicable and, accordingly, the solicitors on each side agreed to the committee proceeding on the documentary evidence of the trial. The committee decided that the doctor had been guilty of infamous conduct and that his name should be struck off the medical register.

Held: (1) the record of the criminal proceedings having been put in evidence by consent as soon as the committee had decided, quite properly, that the attendance of the witnesses from Malaya was not practicable and that their absence did not vitiate the proceedings, that consent was fatal to any objection to it; (2) there had been no miscarriage of justice, since the copy of the record of proceedings was properly admissible, subject to the Medical Disciplinary Committee (Procedure) Rules, 1951, because the disciplinary committee, as a domestic forum but not a Court of law, had duty to make due inquiry whether the appellant had been guilty of infamous conduct in a professional respect.

Dicta of Viscount Simon, L. C. Lord Atkin and Lord Wright in *General Medical Council v. Spackman*⁽¹⁾ applied.

Cases referred to :—

- (1) *General Medical Council v. Spackman* (1943) A.C. 627; (1943) 2 All E.R. 337.